APPENDIX

Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 393—September Term, 1967.

(Argued April 5, 1968 Decided June 5, 1968.)

Docket No. 31852

JANEL SALES CORP.,

Plaintiff-Appellant,

—against—

LANVIN PARFUMS, INC. by change of name
LANVIN-CHARLES OF THE RITZ, INC.,

Defendant-Appellee.

CARLTON DRUG, INC.,

Plaintiff-Appellant,

—against—

LANVIN PARFUMS, INC. by change of name
LANVIN-CHARLES OF THE RITZ, INC.,

Defendant-Appellee.

Before:

MOORE, WOODBURY* and SMITH,

Circuit Judges.

* Of the First Circuit, sitting by designation.

Appeal from a judgment entered in the United States District Court for the Southern District of New York, Wyatt, *Judge*, after a trial before a jury; the judgment was based on a directed verdict for defendant on the price maintenance issue and on a jury verdict for defendant as to the customer limitation issue. Reversed and remanded.

MORRIS SIEGEL, New York, N. Y., *for plaintiffs-appellants.*

MACDONALD FLINN, New York, N. Y. (White & Case, New York, N. Y., Thomas McGanney, New York, N. Y., and Fred Greene, New York, N. Y., of counsel), *for defendant-appellee.*

MOORE, *Circuit Judge*:

Defendant-appellee, Lanvin Parfums, Inc., by change of name Lanvin-Charles of the Ritz, Inc. (hereinafter Lanvin), produces, imports and sells fragrances and other cosmetics. During the years in question here, it had only two places of business, an office in New York City, and an office, warehouse and factory in Long Island City, New York. It averaged about $17,000,000 in national sales annually and about $3,000,000 in New York sales.

All of its sales were made at 40% off its recommended list price or, in States which had fair trade laws, at 40% off the fixed resale price. Most of its sales were made directly to retail dealers. However, the trial judge found that annually approximately $85,000 of the total sales were "accommodation" sales to employees, to firms which did business with Lanvin for their employees (e.g., Bankers

Trust), to employees of firms which dealt with Lanvin (e.g., Parents Magazine) and to persons who serviced Lanvin (e.g., the Pepsi-Cola delivery man). Approximately another $93,000 of its annual New York sales were termed "promotional" by the Court. Usually in larger quantities, these sales were either for the promotion of Lanvin and its customer together (e.g., American Airlines) or primarily for the customer's own promotional campaign (e.g., Paragon Containers). Most of these promotion sales were for the customer's own campaign. However, in both cases, the purchaser had to have had some prior business dealings with Lanvin (e.g., Paragon supplied it with containers).

Prior to the bringing of this suit, Lanvin had entered into fair trade agreements with several retailers in New York.[1] The standard contract provided, *inter alia*, that:

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1 New York General Business Laws §§369-a(1) and 369-b:

§369-a.

1. No contract relating to the sale or resale of a commodity which bears, or the label or content of which bears, the trade mark, brand, or name or the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the state of New York by reason of any of the following provisions which may be contained in such contracts:

(a) That the buyer will not resell such commodity except at the price stipulated by the vendor;

(b) That the vendee or producer require any dealer to whom he may resell such commodity to agree that he will not, in turn, resell except at the price stipulated by such vendor or by such vendee.

§369-b.

Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provision of section three hundred sixty-nine-a, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby.

(1) "Retailer" will not (except as specifically permitted by said Fair Trade Act) directly or indirectly advertise, offer for sale, or sell any of such "Commodities" in said State at less than the minimum retail prices stipulated therefor by "Manufacturer."

* * * * *

(6) "Retailer" will not, where statute or law permits such restriction, sell any of the "Commodities" except to consumers for use.

Lanvin diligently enforced clause (1). The evidence is conflicting as to how insistently it enforced clause (6), if it enforced that provision at all.

Janel Sales Corp. and Carlton Drug, Inc. (hereinafter plaintiffs) were large discount drug stores in New York City. Together they averaged approximately $650,000 in annual sales, roughly 7% of which is in the cosmetic field. They were not direct accounts of Lanvin and they were non-signers to the resale price maintenance contract; nevertheless, they acquired (by diversion from other retail stores) Lanvin's products and sold them at a slight discount.

Most of their sales were to individuals; in some instances, they sold to the same people who bought perfume from Lanvin at 40% off the fair trade price. Plaintiffs also sold cosmetics in bulk to various firms for gifts and promotional campaigns. Usually these businesses were in the neighborhood. Lanvin also sold its products to several businesses in plaintiffs' vicinity, including one company in plaintiffs' building (e.g., Pop's Textiles). These sales were for promotional campaigns and Lanvin made them at 40% off the fixed resale price. Nevertheless, Lanvin sought to enjoin plaintiffs from selling Lanvin perfumes to any of these customers at a price below the stipulated fair trade price.

The New York Court issued the injunction. *Lanvin Parfums, Inc.* v. *Carlton Drug, Inc.*, 1962 Trade Cases ¶70,563 (N. Y. Sup. Ct.); *Lanvin Parfums, Inc.* v. *Carlton Drug, Inc.*, 1963 Trade Cases ¶70,645 (N. Y. Sup. Ct.) *aff'd* 264 N. Y. S. 2d 212 (App. Div. 1965).

Plaintiffs brought this action (before Court and jury) for treble damages[2] and for injunctive relief, 15 U. S. C. §§15, 26, based on Lanvin's alleged violation of the Sherman Act, 15 U. S. C. §1. The district judge correctly ruled that the New York State decisions enjoining plaintiffs are not binding on the federal court, *Lyons* v. *Westinghouse Electric Corp.*, 222 F. 2d 184 (2 Cir.), *cert. den.* 345 U. S. 923 (1955). Furthermore, he correctly recognized that whatever reach the New York courts might give the New York Fair Trade Laws, such decisions are subject to McGuire Act[3] limitations. *Sunbeam Corp.* v. *Masters, Inc.*, 157 F.

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2 Of course, there can be no damages arising from the state court injunction, even if the issuance of it was in error. Plaintiffs' remedy for an erroneous state court decision rests in the state courts. See *DiGaetano* v. *Texas Co.*, 300 F. 2d 895 (3 Cir. 1962); *Fiumara* v. *Texaco Inc.*, 204 F. Supp. 544 (E. D. Pa.), *aff'd* 310 F. 2d 737 (3 Cir. 1962).

3 66 Stat. 631 (1952), 45 U. S. C. §§45(a)(1)-(a)(5):

(a) (1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.

(2) Nothing contained in this section or in any of the Antitrust Acts shall render unlawful any contracts or agreements prescribing minimum or stipulated prices, or requiring a vendee to enter into contracts or agreements prescribing minimum or stipulated prices, for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale.

(*continued on following page*)

Supp. 689, 691 (S. D. N. Y. 1957). Nevertheless, in our opinion he incorrectly ruled (1) that Lanvin was not a "retailer" as a matter of law, and even if it were, the quantity of accommodation-retail sales was *de minimis* and (2) that as a matter of law the amount of competition between Lanvin and plaintiffs was irrelevant.

Therefore, he erred in directing a verdict on these two points.

I.

Price maintenance agreements are *per se* violations of the Sherman Act §1. This is true for horizontal contracts, as, for example, where two competing manufacturers contract not to sell below a specified price, *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150 (1940); *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U. S.

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(3) Nothing contained in this section or in any of the Antitrust Acts shall render unlawful the exercise or the enforcement of any right or right of action created by any statute, law or public policy now or hereafter in effect in any State, Territory, or the District of Columbia, which in substance provides that willfully and knowingly advertising, offering for sale, or selling any commodity at less than the price or prices prescribed in such contracts or agreements whether the person so advertising, offering for sale, or selling is or is not a party to such a contract or agreement, is unfair competition and is actionable at the suit of any person damaged thereby.

(4) Neither the making of contracts or agreements as described in paragraph (2) of this subsection, nor the exercise or enforcement of any right or right of action as described in paragraph (3) of this subsection shall constitute an unlawful burden or restraint upon, or interference with, commerce.

(5) Nothing contained in paragraph (2) of this subsection shall make lawful contracts or agreements providing for the establishment or maintenance of minimum or stipulated resale prices on any commodity referred to in paragraph (2) of this subsection, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other.

211 (1951); it is also true for vertical agreements, as, for example, when a retailer of a specified product agrees with the manufacturer of the product not to sell it below a specified price. *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U. S. 373 (1911). However, such agreements, otherwise *per se* violations of the antitrust laws, may be immunized by federal statute. See *United States* v. *McKesson & Robbins, Inc.*, 351 U. S. 305 (1956). And the Miller-Tydings Act[4] was Congress' first immunizing statute in this area. In amending the Sherman Act §1, this Act provided for legal resale price maintenance in states in which such vertical contracts were allowed, providing, however, that the prior prohibition on *per se* horizontal agreements would be retained.[5] But in *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U. S. 384 (1951), the Supreme Court held that this Act did not permit a producer to enforce a resale price maintenance contract against nonsigning retailers. In that Court's opinion, not only was such an interpretation not intended by Congress, but it would also be "price-fixing by compulsion."

Congress reacted to the *Schwegmann* case with the McGuire Act. It was passed as an amendment to the Federal Trade Commission Act,[6] and its primary purpose was to reverse the limiting features of the *Schwegmann* decision. The Report of the House Committee on Interstate Commerce, which accompanied the McGuire Act, declared that:

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4 50 Stat. 693 (1937), 15 U. S. C. §1.

5 "... That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment of maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other." 15 U. S. C. §1.

6 38 Stat. 711 (1914).

"The primary purpose of the bill is to reaffirm the very same proposition which, in the committee's opinion, the Congress intended to enact into law when it passed the Miller-Tydings Act . . . . , to the effect that the application and enforcement of State fair-trade laws—including the nonsigner provisions of such laws—with regard to interstate transactions shall not constitute a violation of the Federal Trade Commission Act or the Sherman Antitrust Act. This reaffirmation is made necessary because of the decision of a divided Supreme Court in *Schwegmann* v. *Calvert Distillers Corporation* (341 U. S. 384, May 21, 1951). In that case, six members of the Court held that the Miller-Tydings Act did not exempt from these Federal laws enforcement of State fair trade laws with respect to nonsigners. Three members of the Court held that the Miller-Tydings Act did so apply."

Paragraphs (3) and (4) were newly added (paragraphs (2) and (5) were almost identical to the Miller-Tydings Act) to provide that if the State statutory scheme permitted price maintenance against nonsigners, such contracts would be immunized from antitrust violations. It was clear, however, that Congress purported to do no more. It did not intend to immunize additional horizontal arrangements. *United States* v. *McKesson & Robbins, Inc., supra* at 310-311. Paragraph (5) of the McGuire Act, as with the Miller-Tydings Act before, explicitly excepted contracts which fixed prices on a horizontal level.

"(5) Nothing contained in paragraph (2) of this subsection shall make lawful contracts or agreements providing for the establishment or maintenance of minimum or stipulated resale prices on any commodity re-

ferred to in paragraph (2) of this subsection, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other."

The legal issues in this case revolve about the proper interpretation of this exception paragraph.

II.

It is arguable that if the phrase "in competition with each other" modifies "retailers," there must be a showing, as there was not in this case, of some quantum of competition between the signing retailers and the manufacturer-retailer before the contract falls within the scope of paragraph (5). As a point of grammar, this interpretation is possible. However, even though the Supreme Court did not find it necessary to answer this question, see *United States* v. *McKesson & Robbins, Inc., supra,* the legislative history supports the conclusion that it is immaterial whether a manufacturer-retailer and a signing retailer are in actual competition.[7] As Senator Tydings, the author of the proviso, said:

"• • • The amendment provides that nothing in this particular provision shall permit manufacturers to combine with manufacturers, wholesalers with wholesalers, factors with factors, or retailers with retailers. This is made absolutely certain. I do not think it was necessary, but I was glad to put into place the matter beyond the peradventure of a doubt." 81 Cong. Rec. 7496.

7 Debate on HR 5767, 82nd Cong., 2d Sess., 1952.

If two retailers sign a price maintenance contract, regardless of whether they are competitors, then the contract is within paragraph (5) and, therefore, excluded from McGuire Act immunization from the Sherman Act. *Johnson & Johnson* v. *Avenue Merchandise Corp.*, 193 F. Supp. 282 (S. D. N. Y. 1961).

Thus, the first question of fact is whether Lanvin is functionally a retailer. The district court held as a matter of law that none of the accommodation sales were retail sales. It said:

> "[A]s a matter of human nature all manufacturers could be expected to follow this practice, and that they do so would not change their status from a manufacturer to that of a retailer."

Moreover, it found that even if the total of accommodation sales were at retail, the volume would be too insignificant to make Lanvin a retailer.

The term "retailer" is to be understood in its normal and customary manner. *United States* v. *McKesson & Robbins, Inc., supra* at 388. Indicia of a retail sale are the actual size of the sale, the dollar value of the sale, and the number of similar sales that are made. However, the principal focus must be whether " . . . the purchaser is actuated solely by a desire to satisfy his own personal wants or those of his family or friends through the use of the commodity . . . purchased." *Roland Electric Co.* v. *Walling*, 326 U. S. 657, 164, *Parke, Davis & Co.* v. *Janel Sales Corp.*, 328 F. 2d 105, 106 (2 Cir.), *cert. denied*, 379 U. S. 835 (1964).

Nevertheless, it seems only common sense to exclude legitimate accommodation sales to employees from this general definition. These sales are merely incidental and accessory. *General Electric Co.* v. *Kimball Jewelers*, 132

N. E. 2d 652, 657 (Mass. Sup. Ct. 1956); *General Electric Co.* v. *Hess Brothers, Inc.*, 155 F. Supp. 57, 62 (E. D. Pa. 1957). However, as the sales spectrum broadens, the alleged accommodation sales may become a subterfuge for retail selling. For example, are sales to typewriter repairmen and Pepsi-Cola delivery men truly akin to employee accommodation sales in this case? And in what niche do Lanvin's sales to its attorneys fall? Are all these sales merely incidental and accessory? At some point, and this is a question of fact, these allegedly incidental "accommodation" sales may become true retail sales. And since reasonable men may differ as to the precise spot along the spectrum where the distinguishing line should be placed, the jury should have an opportunity to draw it. Reasonable men may also differ as to what quantum of retail sales is necessary to change the status of a producer to a functional retailer. Certainly $1 would be *de minimis*. But this is a case involving tens of thousands of dollars worth of accommodation sales. Again, the jury should have the opportunity to determine where the line is best drawn. If it is found, as a matter of fact, that Lanvin is a retailer, the resale price maintenance contract falls within paragraph (5) of the McGuire Act and the contract loses its statutory immunization.

III.

However, even if Lanvin is not considered a retailer, the contract will still violate the Sherman Act if it provides for resale price maintenance between competitors, regardless of whether these competitors are signatories to the contract. Lanvin disagrees.

First, Lanvin contends that the paragraph (5) exclusion was intended to exclude resale price contracts only in situa-

tions in which the signing parties are competitors. Primary reliance is placed on language in *United States* v. *McKesson & Robbins, Inc., supra* at 313, in which the Supreme Court, in striking down a wholesaler's resale price agreement with competing, signing wholesalers, said:

> "Congress thus made as plain as words can make it that, without regard to catalogues or labels, the crucial inquiry is whether the contracting parties compete with each other."

However, the Court was concerned with competing signers. From the whole opinion, it is clear that the Supreme Court was principally interested in horizontal competition. See *G. E. M. Sundries Co.* v. *Johnson & Johnson, Inc.*, 283 F. 2d 86, 92 (9 Cir. 1960).

Second, Lanvin relies on the statutory construction of paragraph (5) espoused in *Johnson & Johnson* v. *Janel Sales Corp.*, 192 F. Supp. 780 (S. D. N. Y. 1961). In that case, the court observed that paragraph (5) referred specifically, and only, to paragraph (2)—which protects fair trade contracts. On the other hand, paragraph (4) referred to both paragraphs (2) and (3). Therefore, it reasoned, paragraph (5) only exempts paragraph (2) contracts between competing parties from the McGuire Act immunization.

The court recognized, however, that such an interpretation opened a wide loophole. A producer might enter into a single resale price maintenance contract with a retailer. As long as the producer itself did not become a retailer in fact, it could enforce this fixed price against all sellers of its product, even though they might be competitors for commercial accounts or bulk sales. A producer might go further and attempt to hold the bulk sales competitor to the

fair trade price while at the same time setting his own price below that level.[8] This is what allegedly happened in this case. The court thought, however, that a "surgical operation too serious for the judiciary to perform" would be necessary to close the loophole.

We do not believe that the statutory language is so compelling. Underlying the court's reasoning is the assumption that the phrase "in competition with each other" refers to the parties who sign the "contracts or agreements." It is possible that the phrase refers to those parties for whom the resale "prices" are stipulated. If this interpretation were accepted, paragraph (5) would still exclude only paragraph (2) contracts, but the issue would be whether these contracts provided for the establishment of prices between competitors.[9]

The legislative history is not very helpful on this point. However, in passing the McGuire Act, Congress' principal purpose was to reverse the *Schwegmann* decision. That case had prohibited a producer from enforcing his price maintenance contract against nonsigning, noncompeting (with it) retailers. There is no indication that Congress intended to do more; in fact, there was constant concern with horizontal price fixing, either by agreement or compulsion.

Esso Standard Oil Co. v. *Secatore's Inc.*, 246 F. 2d 17 (1 Cir.), *cert. denied* 355 U. S. 834 (1957) supports our interpretation. In that case, Esso was denied an injunction against a nonsigning service station which sold to commer-

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8 Case comment, 75 *Harv. L. Rev.* 842 (1962).

9 Of course, we do not refer to the maintenance of a stipulated price among retailers when such a resale price is based on a legal vertical contract between a retailer and a producer. We are here concerned only with the situation in which it is the producer who may actively compete with parties bound, by State law, to the stipulated price.

cial accounts, for Esso also sold to commercial accounts. Therefore, since Esso and Secatore's were "corporations in competition with each other," the resale price maintenance contract entered into between Esso and other retailers could not support an injunction. The concurring opinion makes it clear that the crucial fact for the majority was that Esso and the nonsigning Secatore's were competitors. Accord, *Texas Co.* v. *DiGaetano*, 1963 Trade Cases ¶70,646 (Sup. Ct. N. J. 1963); *Gulf Oil Corp.* v. *Mays*, 1960 Trade Cases ¶69,821 (Sup. Ct. Pa. 1960). But cf. *Parke, Davis & Co.* v. *Janel Sales Corp., supra.* However, this last case is distinguishable, for the only question on appeal was whether Parke, Davis was a retailer. Moreover, there was no proof of any competition between Parke, Davis and a retailer.

Thus, the question is one of contractual interpretation. Does this resale price maintenance contract provide for the establishment of resale prices between Lanvin and its competitors? Although in some cases this might call for a more elaborate factual inquiry, see *Snap-On Tools Corp.* v. *F. T. C.*, 321 F. 2d 825, 834-35 (7 Cir. 1963), in this case, assuming *arguendo* that Lanvin and plaintiffs are competitors, there is no doubt. First, there was no contractual limitation on the type of sales to which resale price maintenance was to apply. Lanvin could easily have contracted, for example, not to fix resale prices for bulk sales to businesses for their promotional compaigns. Of course, if Lanvin had done that, it would not have been able to enjoin Janel from selling at a discount to these concerns. Such contractual limitations are not uncommon. For example, in *General Electric Co.* v. *Hess Brothers, Inc., supra* at 62 n. 6, the court commented:

> "• • • even if Plaintiff herein is considered to be in competition with defendant and other retailers for sales to the exempted groups, it has not required such competitors to meet minimum fair trade prices in sales to the exempted groups."

Accord *Parke, Davis & Co.* v. *Rocket Drugs, Inc.*, 214 F. Supp. 937, 939 (S. D. N. Y. 1963) (contractual exclusion of sales to hospitals, clinics, etc., from the minimum stipulated).

Furthermore, the State court has issued an injunction against plaintiffs. *Lanvin Parfums, Inc.* v. *Carlton Drug, Inc., supra.* Still assuming that plaintiffs and Lanvin are competitors, this action must have been based on an interpretation of the contract which allowed for the establishment of a resale price between Lanvin and its competitors. See *Port Chester Wine & Liquor, Inc.* v. *Miller Bros. Fruiterers, Inc.*, 281 N. Y. 101, 22 N. E. 2d 253 (1939). We are of course obligated to accept the State's interpretation of the contract.

Therefore, there is a question of fact—are Lanvin and plaintiffs in competition with each other? A determining factor might well be whether or not there may be a substantial number of customers who might buy from either. Of course, they are not competitors simply because they share a common customer. However, as the number of customers grows, the more probable it is that reasonable men might find that the supposed accommodation sales were a subterfuge and that the companies were in competition with each other. Furthermore, the fact that Lanvin has termed many of these sales "promotional" does not necessarily prevent them from being competitive sales. It is for the jury to look behind the labels. Lanvin is, of course, free

to advertise and promote its own products as it wishes. But sales to Goldman Sachs & Co. for gifts at a dinner or sales to American Airlines for distribution in jet plane seats, both at 40% off the list price, are not solely for Lanvin's own promotional purposes. As these sales tend to benefit the purchaser's own promotional campaign, these buyers grow more willing to purchase the product from other available and competitive sources. Thus, they might become potential buyers from companies like the plaintiffs here. This is even more certain when these purchasers do business in plaintiffs' neighborhood. (E.g., *Pop's Textiles*).

As with the retailer issue, reasonable men may differ as to at what point Lanvin purchasers become probable customers of both Lanvin and plaintiffs. Moreover, reasonable men may also differ as to what volume of competitive sales will place Lanvin and plaintiffs in competition with each other. Therefore, the question—were Lanvin's sales "accommodation," "promotional" or competitive—would best be directed to the jury.

IV.

Plaintiffs also contend that the "customer limitation" clause (clause (6)) was a *per se* violation of the Sherman Act §1. They argue this position even though the jury gave a negative answer to the following question:

> Did defendant Lanvin agree, combine, or conspire with Royal Drug Store or Hubert Drug Company, or both, that Lanvin products sold to Royal Drug Store or Hubert Drug Company would not be resold to plaintiffs Janel and Carelton?

In the first place, plaintiffs did not take proper objection to the charge as required by Fed. R. Civ. P. 51. The dis-

cussion of this question concluded with the following remarks:

> "The Court: Well, Mr. Siegel, would you then, on the basis of what you tell me, say that the question properly to be submitted to the jury would be: Did defendant agree, combine, or conspire with Royal and Hubert that Lanvin products sold to Royal and Hubert would not be resold to plaintiffs?
>
> "Mr. Siegel: I would say so, yes.
>
> "The Court: You would say so?
>
> "Mr. Siegel: Definitely."

In the second place, the existence of such a contractual clause does not necessarily imply a *per se* violation. In *United States* v. *Arnold Schwinn & Co.*, 388 U. S. 365, 372 (1965), the Supreme Court premised its finding of a *per se* violation on the fact that Schwinn had been "firm and resolute" in insisting on compliance. Here, the evidence was conflicting on that issue. Plaintiffs' principal witness claimed that he was unable to buy Lanvin products from various retail stores; he claimed that the owners were afraid to sell to him, for if they did, they would lose the Lanvin line. Lanvin's witnesses contradicted this story. Moreover, Lanvin suggested that it never had, and never enforced, a policy against diversion. Consistently with the rest of this decision, we believe that this type of question, with the proper guidance from the judge, is best settled by the jury.

On the whole, the trial judge's charge was proper here. He made it clear that the agreement need not be express or formal, that the contracting parties need not directly state their object and purpose and that although the ques-

tion was stated in specifics, it was meant to ask whether or not direct accounts of Lanvin could not resell except to consumers. Since the jury answered the trial judge's question in the negative after this charge, plaintiffs' customer limitation argument is to no avail.

Reversed and remanded.

Opinion of the United States District Court

OPINION No. 34043

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Filed
U. S. District Court
September 26, 1967
1:02 P. M.
S. D. of N. Y.
/s/ J.M.

WYATT, District Judge,

MEMORANDUM ON MOTION BY DEFENDANT FOR DIRECTION OF A VERDICT

When all of the evidence had been taken in these cases and both sides had rested on September 21, 1967, defendant moved for a directed verdict. I decided the motion on the record at the time but stated that I would later file a memorandum of the reasons for the disposition made. This is that memorandum.

The charges in the complaints are made in paragraphs 12 and 13 thereof. When defendant some two years ago made a motion for summary judgment, plaintiffs, in their statement submitted to Judge Ryan under General Rule 9(g) of this Court "of the material facts as to which it is contended that there exists a genuine issue to be tried", formulated the issues tendered by their complaints. Their Rule 9(g) statement read in this respect as follows:

"There exists in this case genuine issues which must await a full trial as to the following matters, to wit:

1. That defendant is engaged in the retail business in competition with those persons, firms and corporations with whom defendant purports to fix the retail prices at which Lanvin products are sold and which are prohibited by 15 USCA 45 (a) 5.

2. That Lanvin has arbitrarily refused to sell its products to the plaintiff.

3. That Lanvin has boycotted and refused to sell its products to Lanvin's customers who sold such products to the plaintiff."

Judge Ryan found that there was at least an issue of fact as to the third matter above; he denied the motion for summary judgment by order with memorandum opinion, filed March 11, 1965.

At pretrial conferences shortly before this trial began, it was repeated for plaintiffs that the three issues to be tried were as stated; evidence was received at this trial on all three issues.

The conclusion I reached at the end of the trial was that the evidence did not justify submitting the first two claims of plaintiffs to a jury. I therefore granted the motion of defendant that a verdict to be directed in favor of defendant as to the first two claims. Procedurally this is covered by Fed. R. Civ. P. 50.

This memorandum will record some of the reasons for my conclusion and is primarily for the parties and for the appellate court, if the case should go there.

First, I recognize that after all the evidence is in, a verdict should normally be taken; if the judge finds it not supported, then he can set it aside. I recognize that the reason for this is to avoid the necessity for a new trial if the trial judge has made an error. This is set out in the *Fratta* decision, 139 F. 2d 743, and the *Lindeman* decision, 229 F. 2d 273, both in our Circuit; See also 2B Barron & Holtzoff § 1076. But I believed that this was an exception to the general rule and that I was required to direct a verdict as to two of the claims.

The first claim is of illegal price fixing, based on the agreements made in New York by defendant under the so-called fair trade laws—in New York the Feld Crawford Act, General Business Law §§ 369-a, 369-b.

This law in New York in substance permits the owner or producer of trademarked products to make a contract of sale of such products and to provide therein that the products may not be resold below a specified price.

Despite such state laws, the contracts described would be in and of themselves in plain violation of the Sherman Act. Expressly to exempt such contracts from the Sherman Act, Congress passed in 1937 the Miller Tydings Act, —now part of 15 U. S. C. § 1.

The New York law, however—in common with laws in many states—makes it an act of unfair competition if *any* person sells a fair trade product at less than the resale prices fixed in any contract signed under the terms of the law. In other words, the resale prices fixed in any New York fair trade contract are binding on everybody, whether a party to such a contract or—as usually expressed in this area—a "non-signer".

But in 1951 the Supreme Court in the *Schwegmann* decision, 341 U. S. 384, by 6 to 3, decided that the Miller

Tydings Act did not enable state law to bind non-signers to fixed resale prices.

Congress then in effect reversed the Supreme Court and in the McGuire Act, an amendment to 15 U. S. C. § 45, made lawful the exercise of any right created by state law against non-signers—exempting such action from the anti-trust laws.

The McGuire Act expressly provided that it did not make lawful, contracts "between retailers" which fixed resale prices.

What the plaintiffs say here in that Lanvin is a "retailer" as that word is used in the McGuire Act, that the fair trade contracts in New York between Lanvin and certain of its customers—admittedly retailers—are thus between retailers and not within the immunity of the McGuire Act and that, in consequence, Lanvin and its signing customers made illegal price fixing agreements.

It may be noticed in passing that the McGuire Act also does not make lawful any contract to maintain resale prices made between persons "in competition with each other". The contract referred to is that made by defendant for maintenance of resale prices. See in this connection the opinion of Judge Bryan in *Johnson and Johnson* v. *Avenue Merchandise Corp.*, 193 F. Supp. 282. Admittedly, defendant made resale price maintenance contracts, but not with these plaintiffs' and the names and locations of those with whom defendant made such fair trade contracts have not been shown. There was much evidence urged for plaintiffs as showing that defendant was in competition with *plaintiffs*. This evidence is irrelevant as far as the "competition" language of the McGuire Act is concerned; it may be relevant to show that

defendant is a "retailer" or it might be relevant on the question of damages.

The question as to the first claim is whether Lanvin is a "retailer".

As to this, there is no issue of fact and no question of credibility. The facts are undisputed. The only question is: what is the correct conclusion under the McGuire Act? Plainly the answer seems for the Court, not for the jury.

Defendant makes, imports and sells fragrances and other cosmetics having old, widely known, and valuable trademarks—such as Lanvin, Arpege, My Sin and others—and distinctive packages and advertising. It sells *for resale* only to direct accounts, all of which are stores which sell at retail. They are department stores, specialty shops, drug stores and others. Defendant does not sell to wholesalers or other distributors. All sales are made at 40% of the suggested retail price or in fair trade states, the fixed fair trade price.

The defendant has only two places of business an office in New York City and an office, warehouse and factory across the river in Long Island City. All sales are f.o.b. New York. The New York office in the relevant period—1959 through July 23, 1963—was at 767 Fifth Avenue in the Savoy-Plaza, later Savoy Hilton, Hotel. In the Savoy-Plaza Hotel there was also a display room or salon of defendant but not retail sales were made from this room at any time; it was for advertising, sampling, display, and information.

Judge Ryan, by order filed February 25, 1965, required defendant to produce certain invoices for inspection; to describe the order in brief, it related to those invoices

on which New York City sales tax was charged. The reasoning of plaintiffs behind such request for discovery must have been that any sale on which New York City sales tax was charged must be a sale for some purpose other than resale since New York City does not impose a sales tax on sales for resale. See City Rules & Regs. Art. 10. Since plaintiffs do business only in New York City, presumably they were interested only in non-resale sales of defendant within New York City.

The invoices were produced by defendant and examined by plaintiffs. Part of the invoices were classified by defendant as "promotional"—a term later to be explained. Plaintiffs made records of the total amount in each year of all the invoices produced, and a separate record of the totals of those invoices classified as "promotional". Plaintiffs also selected many invoices and had them copied. These were introduced in evidence but, of course, they do not reflect the total volume of the sales at issue because they were selected from larger group of the same type. The total volume of the sales at issue is reflected by the figures compiled by the accountant for plaintiffs during their inspection of all the invoices.

Evidence was produced by defendant of its total sales for the years at issue, and also its total sales in the State of New York.

The relevant data from the foregoing evidence is shown below as follows:

	1	2	3
	Total Net Sales	*Net Sales in Evidence (invoices)*	*Percentage 2 of 1*
1959	$13,841,247	$149,664.53	1.08%
1960	16,666,208	169,138.77	1.01
1961	18,182,401	228,464.01	1.26
1962	19,245,189	170,961.30	.89
	Total Net Sales	*Sales in Evidence excluding "promotional"*	*Percentage 2 of 1*
1959	$13,841,247	$ 92,215.83	.67%
1960	16,666,208	81,678.18	.49
1961	18,182,401	102,051.31	.56
1962	19,245,189	67,167.42	.35
	New York State Net Sales	*Net Sales in Evidence*	*Percentage 2 of 1*
1959	$2,579,294.95	$149,664.53	5.80%
1960	2,920,977.75	169,138.77	5.79
1961	3,289,474.20	228,464.01	6.95
1962	3,322,034.05	170,961.30	5.31

	New York State Net Sales	*Sales in Evidence excluding "promotional"*	*Percentage 2 of 1*
1959	$2,579,294.95	$ 92,215.83	3.58%
1960	2,920,977.75	81,678.18	2.80
1961	3,289,474.20	102,051.31	3.10
1962	3,322,034.05	67,167.42	2.08

Plaintiffs say that the nature and amount of the non-resale sales shown in column 2 above show that defendant is a "retailer".

The "promotional" sales, all made at 40% off retail price, are of two general types: (a) to businesses for the promotion of Lanvin's goods, goodwill, and name and (b) to businesses for the promotion of their own goods, goodwill, and name. Example of the first type are sales by Lanvin to Kayser-Roth for inclusion with their own products which are "Lanvin" stockings; sales to Avis for distribution in their rental cars; sales to American Airlines for distribution in jet plane seats; and the like. In substance, this first type is a joint promotion of Lanvin and the purchaser. Examples of the second type (and the second type was apparently much greater in volume than the first type) were to businesses for gifts to their employees or customers. For example, Consolidated Edison bought a substantial amount of perfume to be used as gifts to court attendants, because the company was so often in litigation; Bankers Trust bought perfume to be given to its employees; Goldman Sachs & Co., investment bankers, bought perfume for use as gifts at a banquet; Paragon, a container manufacturer, bought perfume for gifts to its customers. It appears that such sales were

made in most, if not all, instances to businesses having some connection with Lanvin (for example, Paragon supplied Lanvin with its boxes) but even if there were no connection of the purchaser with Lanvin, it would make no difference here because the sales in any event were not "retail" sales.

Before giving the reason for this last conclusion, it should be noted that there is no evidence that all "promotional" sales were disclosed to plaintiffs. This was not any fault of defendant, but was because, as the discovery developed, only sales with a New York City sales tax were sought by plaintiffs. It is possible that there were "promotional" sales with deliveries being made outside New York City; if so, no New York City Sales tax would have been payable (Tax Law § 1213) and invoices for such sales would not have been produced by defendant.

But this would not affect the result here because no "promotional" sales (as described above), wherever delivered, were "retail" sales.

The reason for this conclusion is that, in the context of the present problem, our Court of Appeals has applied, in determing whether a sale is "retail", the test laid down, in another context, in *Roland Electric Co.* v. *Walling,* 326 U. S. 657, 674 (1946), namely, whether "the purchaser is actuated solely by a desire to satisfy his own personal wants or those of his family or friends through the personal use of the commodity . . . purchased". *Parke, Davis & Co.* v. *Janel Sales Corp.,* 328 F. 2d 105, 106 (2d Cir. 1964).

The sales made by defendant which were not for resale and were not "promotional" sales were sales to individuals for their own use (or family or friends). These,

of course, do not fall under the *Walling* principle but, on the facts here, such sales by defendant did not make defendant a "retailer" within the McGuire Act.

It may be noticed in this connection that—unlike "promotional" sales—the technique of discovery would reveal the total volume of sales by defendant to individuals. This is because the only offices of defendant were in New York City and the only sales to individuals, according to the evidence, would have to be from the New York City offices with delivery in New York City. If defendant therefore produced invoices for all sales with New York City sales tax, this should reveal the total of all sales to individuals.

The volume of such sales was as follows:

1959	$ 92,215.83
1960	81,678,18
1961	102,051.31
1962	67,167.42

These sales included sales to employees. Defendant had in New York City the following number of employees:

Year	Employees
1959	443
1960	556
1961	497
1962	485

These employees, according to a policy of defendant, were permitted to buy Lanvin products at 40% off retail but were limited to a purchase once a week to a maximum of

$50 per month; above that amount, special approval from a senior official was required.

Defendant also made sales at 40% off retail to post office and custom house employees with whom defendant did business, to policemen and firemen who performed services in and about the premises, to employees of magazines through the beauty editor of the magazine, to typewriter servicemen, to telephone men, to resident buyers of direct accounts (department store chains), to executives (or their families) of other perfume companies, to members of the Lanvin family, to Pepsi-Cola delivery men (there was a Pepsi-Cola dispensing machine in the Long Island City offices), to relatives of officials of defendants, to lawyers for defendant, to advertising men who did work for defendant, and to others. It appears that in all such cases the individual had to be known to defendant's organization as one who personally had some connection with defendant. For example and as I understand the evidence, defendant did business with the Telephone Company but would not on this account make sales to all employees of the Telephone Company; it would sell to those employees who came to defendant's premises—such as the telephone service men or who otherwise personally performed services for defendant. The same policy applied to postmen, customs officials, policemen, firemen, and the other types. Defendant called all such sales, "accommodation" sales.

No case has been cited (or found) dealing with such sales under the McGuire Act.

On the basis of everyday experience, however, I cannot believe that sales of such nature would make defendant a "retailer". It would seem to me that as a matter of human nature all manufacturers could be expected to

follow this practice, and that they do so would not change their status from a manufacturer to that of a "retailer".

Moreover, when the volume of such sales is compared to the total sales of defendant, it would seem that the relatively small volume of such sales would itself demonstrate that defendant was not a "retailer".

The second claim as to which a motion for a directed verdict was granted was, as posed by plaintiffs to Judge Ryan on the summary judgment motion, as follows:

> "That Lanvin has arbitrarily refused to sell its products to the plaintiffs".

As put, this states no claim because certainly any business may "arbitrarily" select its own customers so long as it is done as a matter of independent decision. *United States* v. *Arnold, Schwinn & Co.*, —— U. S. ——, 87 S. Ct. 1856, 1864 (June 12, 1967); *United States* v. *Colgate & Co.*, 250 U. S. 300, 307 (1919).

Even treating the issue tendered by the second claim as one that defendant refused to sell plaintiffs as the result of some agreement, combination, or conspiracy, there is no evidence on which any such issue could be sent to the jury. In consequence, a verdict was directed on this issue. This appears to have been agreed to for plaintiffs (SM 580).

The third claim, as put to Judge Ryan, was as follows:

> "That Lanvin has boycotted and refused to sell its products to Lanvin's customers who sold such products to plaintiffs".

As thus put, there was no evidence at the close of the case in support of such a claim.

Being troubled, however, by some of the averments in paragraphs 12 and 13 of the complaint and by recent language in *United States* v. *Arnold Schwinn & Co.*, above at 1865 of 87 Sup. Co., and in the light of some of the evidence, I decided to submit to the jury the third claim by a specific question as follows:

> "Did defendant Lanvin agree, combine or conspire with Royal Drug Store or Hubert Drug Company, or both, that Lanvin products sold to Royal Drug Store or Hubert Drug Company would not be re-sold to plaintiffs Janel and Carlton?"

This form of question was agreeable to the plaintiffs (SM 589; see also 582) and was so put to the jury.

Dated: New York New York
September 26, 1967

/s/ INZER B. WYATT
Inzer B. Wyatt
United States District
Judge

Judgment of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the fifth day of June one thousand nine hundred and sixty-eight.

Present:

HON. LEONARD P. MOORE,
HON. PETER WOODBURY,
HON. J. JOSEPH SMITH,

Circuit Judges.

[SAME TITLE]

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed and that the action be and it hereby is remanded for further proceedings in accordance with the opinion of this court with costs to the appellants.

A. DAVID FUSARO
Clerk